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IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Petitioners,

v.

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Petitioner Richard F. Schauseil

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Petitioner Antonia C. Novello

* *Counsel of Record*

162496 Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

When a married individual living in a nursing home (an "institutionalized spouse") applies for Medicaid, the spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (1992 & Supp. 2000), permit the spouse living at home (the "community spouse") to retain certain income and resources to meet his or her own monthly maintenance needs rather than using them to defray the medical expenses of the institutionalized spouse. In determining whether the community spouse is entitled under the statute to shelter resources in excess of the standard resource allowance, New York, like thirty-five other States, deems income of the institutionalized spouse to be available to meet the needs of the community spouse.

The question presented is whether, in determining if a community spouse is entitled to retain resources in excess of the standard resource allowance, the attribution of the institutionalized spouse's social security income to the community spouse is consistent with the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a), which prohibits subjecting social security benefits to "execution, levy, attachment, garnishment, or other legal process."

LIST OF PARTIES

Nova H. Robbins, on her own behalf and as attorney-in-fact for Robert H. Robbins, was the plaintiff(-appellant) in the courts below, and is the respondent in this Court. Barbara A. DeBuono, as Commissioner of Health of the State of New York, and Richard F. Schauseil, as Director of the Monroe County Department of Social Services, were the defendants (-appellees) in the courts below. Antonia C. Novello is now the Commissioner of Health of the State of New York, and is automatically substituted for Barbara A. DeBuono. Dr. Novello and Mr. Schauseil are the petitioners in this Court.

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OPINIONS BELOW

The opinion of the Second Circuit, reported at 218 F.3d 197 (2d Cir. 2000), is set forth as Appendix A. The unreported decision and order of the district court, entered on May 11, 1999, is set forth as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit was entered on June 30, 2000. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

The anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407(a), (b) (1991 & Supp. 2000), state in pertinent part:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Because of their length, the spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (1992 & Supp. 2000), are set forth in Appendix C.

STATEMENT OF THE CASE

A. Background

This case involves the interplay among the "spousal impoverishment" provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (1992 & Supp. 2000), the "income first" policy employed by New York and many other States to implement the spousal impoverishment provisions, and the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a) (1991 & Supp. 2000).

1. Spousal Impoverishment Budgeting

Medicaid is a joint state and federal program designed to provide necessary medical care for persons unable to afford such care. *See* 42 U.S.C. §§ 1396-1396v (1992 & Supp. 2000). Generally speaking, only those individuals with income and resources below prescribed levels are eligible for Medicaid. Where an individual's monthly income exceeds the prescribed level, the individual must, to be eligible for Medicaid, incur medical expenses sufficient to reduce his or her income to the prescribed level, a process known as "spending down." Excess resources must also be spent down to the prescribed level.

The spousal impoverishment provisions are rules for determining the Medicaid eligibility of persons who are institutionalized, typically in a nursing home (the "institutionalized spouse"), and who have a spouse in the community (the "community spouse"). Before 1988, the eligibility rules required such couples to use nearly all of their income to offset the cost of the institutionalized spouse's nursing home care, leaving the community spouse

with little or no income on which to live. *See Schachner v. Perales*, 648 N.E.2d 1321, 1322 (N.Y. 1995) (describing former eligibility rules). The old eligibility rules also forced a couple to liquidate virtually all of their joint resources before the institutionalized spouse could become eligible for Medicaid. *Id.* Congress enacted the spousal impoverishment provisions "to end the pauperization of [the community spouse] by assuring that [he or she] has a sufficient — but not excessive — amount of income and resources when the other spouse is institutionalized in a nursing home." H.R. Report No. 105(II), 100th Cong., 2d Sess. 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 867, 888.

The spousal impoverishment provisions established rules for the division of income between the spouses and for potential transfers of income from the institutionalized spouse to the community spouse sufficient to enable the latter to live at a certain level after the institutionalized spouse becomes eligible for Medicaid. This minimum monthly income is referred to as the "minimum monthly maintenance needs allowance," or the community spouse's "monthly need." *See* 42 U.S.C. § 1396r-5(d)(3) (1992 & Supp. 2000). The income permitted to be transferred from the institutionalized spouse to the community spouse, known as the "community spouse monthly income allowance" ("income allowance"), is not counted in calculating the institutionalized spouse's income that is used to offset nursing home or other medical costs. *See* 42 U.S.C. § 1396r-5(d)(1).

The spousal impoverishment provisions also established rules for allocation of resources in order to protect the community spouse's share of resources from being spent down to qualify the institutionalized spouse

for Medicaid. The portion so allocated is called the "community spouse resource allowance" ("resource allowance"). *See* 42 U.S.C. § 1396r-5(f)(2). Only resources of the couple in excess of this allowance are taken into account in determining the Medicaid eligibility of the institutionalized spouse. *See* 42 U.S.C. § 1396r-5(c)(2). The provisions also allow for certain adjustments to these standard allocations and transfers to assure that the statutory objectives are met. To receive such an adjustment, either spouse may request a hearing. *See* 42 U.S.C. § 1396r-5(e)(2)(B).

2. New York's "income first" policy

Federal and state law require States to increase the amount of a community spouse's resource allowance if either spouse establishes at a fair hearing that the standard resource allowance is inadequate, in terms of the income it generates, to bring the community spouse's income up to the monthly need level. *See* 42 U.S.C. § 1396r-5(e)(2)(C); N.Y. Soc. Serv. Law § 366-c (8)(c) (McKinney 1992). Most States, including New York, allow adjustments to the standard resource allowance to assure sufficient income to the community spouse only after taking into account any permissible income transfer from the institutionalized spouse to the community spouse. This policy, known as the "income first" policy, deems or attributes income from the institutionalized spouse to the community spouse.[1] New York, like thirty-five other

1. "Deeming" and "attribution" are very similar concepts, and the terms are often used interchangeably. "Deeming" is a budgeting procedure in which the income of a legally responsible relative is considered available to an applicant in determining the applicant's eligibility. *See Herweg v. Ray*, 455 U.S. 265, 267 (1982); *Schweiker*

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States, permits the amount of safeguarded resources to be increased only if the community spouse's income, including the amount of any monthly income which the institutionalized spouse is allowed to provide to the community spouse, falls short of the minimum monthly maintenance needs allowance.[2] Respondents do not dispute

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v. Grey Panthers, 453 U.S. 34, 39-40 (1981). Under the spousal impoverishment provisions, "attribution" is the procedure in which income or resources of one spouse are treated as being available to the other. *See* 42 U.S.C. § 1396r-5(b)(2), (c)(2). In this case, the income of the institutionalized spouse (Mr. Robbins) is considered to be available to the community spouse (Mrs. Robbins) in determining whether the community spouse is entitled to an increase in her resource allowance. In this respect, the attribution of the institutionalized spouse's income is a type of deeming.

2. According to a survey conducted by the New York State Department of Health, the other income first States are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Only a handful of States have codified the income first policy in statute or regulation. *See* Cal. Wel. & Inst. Code § 14006.4 (Deering 2000); Colo. Rev. Stat. § 26-4-506 (1999); 10 Colo. Code Regs. 2505-10, § 8.112.13 (1999); Md. Regs. Code tit. 10, § 10.09.24.10-1F(4) (1998); N.J. Admin. Code tit. 10, § 10:71-5.7(d) (2000); Or. Admin. R. 461-160-0580(1)(f)(D) (2000); Utah Code Ann. § 26-18-3.6 (1998); Utah Admin. Code R. 414-305 (2000); Wis. Stat. Ann. § 49.455(8)(d) (1997-1998). In most income first States, the policy is set forth in an administrative directive or policy manual, or simply represents the State Medicaid agency's

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that the "income first" policy comports with the spousal impoverishment provisions, as New York's highest court and every federal court of appeals to address the issue have so held.[3] In addition, the Health Care Financing Administration ("HCFA"), the agency responsible for administering the Medicaid program at the federal level, has advised States that the "income first" policy is a permissible construction of the spousal impoverishment provisions.[4]

(Cont'd)
interpretation of the community spouse's income within the meaning of 42 U.S.C. § 1396r-5(e)(2)(C). *See, e.g.*, Delaware Division of Social Services Medical Assistance Manual 20995.3.2, 20970; Michigan Medicaid Program Administrative Manual, Item 600, p. 33; Minnesota Dept. of Human Services Health Care Programs Manual § 0909.25.05; South Carolina Department of Social Services Medicaid Policy Manual § 12.06.

3. *See In re Golf v. N.Y.S. Dept. of Soc. Serv.*, 697 N.E.2d 555 (N.Y. 1998) ("income first" policy is a reasonable construction of the spousal impoverishment provisions of the Medicaid Act); *Cleary v. Waldman*, 167 F.3d 801 (3d Cir.), *cert. denied*, 120 S. Ct. 170 (1999) (same); *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998) (same); *Thomas v. Commissioner of the Div. of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997) (same). *But see Gruber v. Ohio Dept. of Human Servs.*, 647 N.E.2d 861 (Ohio App. 5th Dist. 1994), *lv. denied*, 646 N.E.2d 468 (1995) ("income first" policy violates federal Medicaid Act); *Kimnach v. Ohio Dept. of Human Servs.*, 645 N.E.2d 825 (Ohio App. 10th Dist. 1994), *lv. denied*, 644 N.E.2d 409 (1995) (same); *Blumer v. Wisconsin Dept. of Health and Family Services*, 615 N.W.2d 647 (Wisc. Ct. App. 2000) (same).

4. *See Cleary v. Waldman*, 167 F.3d at 806-807 n.3 (citing HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3; HCFA Memorandum from Medicaid Bureau Director Sally
(Cont'd)

Other States have adopted a "resource first" policy, whereby the institutionalized spouse is permitted first to transfer excess resources to the community spouse in order to generate additional income to raise the community spouse's income to the minimum level; only if the excess resources fail to do so will the institutionalized spouse then transfer income to the community spouse.[5] This policy allows the couple to retain more of their assets before spending down to become Medicaid eligible. Still other States employ a hybrid approach, whereby it is left to the hearing officer's

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Richardson (March 1994); HCFA Letter to Pennsylvania Department of Public Welfare (April 1994); Chicago Regional State Letter 22-94 (July 1994); Letter from Donna E. Shalala to George V. Voinovich (March 1996)); *Golf*, 697 N.E.2d at 560 (quoting Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, to All Regional Administrators (Mar. 3, 1994)); *Chambers*, 145 F.3d at 800 (quoting HCFA, Medicaid Operations Branch, Chicago Regional State Letter No. 22-94 at 2 (July 1994)).

5. *See, e.g.*, 305 ILL. Comp. Stat. 5/5-4 (West 1998); ILL. Admin. Code, tit. 89, § 120.379 (West 2000); Mass. Gen. Laws ch. 118E, § 21A(c); Mass. Regs. Code, tit. 130, § 520.017(C). Massachusetts formerly used the "income first" policy, but pursuant to a statutory enactment switched to the "resource first" policy. *See Thomas v. Commissioner of the Div. of Medical Assistance*, 682 N.E.2d at 877 n.8 (noting statutory change). Ohio also formerly used the "income first" policy, *see Chambers v. Ohio Dept. of Human Services*, 145 F.3d at 794-795, but in response to adverse lower court rulings amended its regulations to switch to the "resource first" rule, *see* Ohio Admin. Code § 5101:6-7-02(C) (1999). Despite the Sixth Circuit's decision upholding the income first rule, to date Ohio has not switched back to this rule, though it is considering whether to do so.

discretion whether to consider any permissible income transfer before increasing the standard resource allowance.[6]

3. The anti-alienation provision of the Social Security Act

The Old Age, Survivors, and Disability Insurance ("OASDI") benefits program, colloquially known as "social security," provides income to retired citizens. *See* 42 U.S.C. §§ 401-434 (1991 & Supp. 2000). Social security benefits enjoy the protections of an anti-alienation provision, 42 U.S.C. § 407(a), which states that social security benefits shall not "be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The purpose of this provision is "to protect social security beneficiaries and their dependents from the claims of creditors." *Fetterusso v. New York*, 898 F.2d 322, 327 (2d Cir. 1990).

B. Facts

The facts are not in dispute. Robert Robbins was the institutionalized spouse and his wife, Nova, was the community spouse. In determining Robert's Medicaid eligibility, Nova's minimum monthly maintenance needs allowance was budgeted at $2019 and her resource allowance was budgeted at $80,760 (App. A, 5a). Because Nova had personal monthly income of only $830.87 ($1188.13 below her monthly need), the local social services agency attributed $1188.13 of Robert's monthly income (consisting of pension benefits of $1870.28, Social Security benefits of $992.80

6. *See Cleary v. Waldman*, 959 F. Supp. 222, 229-230 (D. N.J. 1997), *aff'd*, 167 F.3d 801 (3d Cir.), *cert. denied*, 120 S. Ct. 170 (1999).

and interest of $9.22) to Nova to raise her income to her monthly need level (App. A, 5a-6a, App. B, 18a). Robert is permitted — but not required — to transfer $1188.13 in monthly income to Nova. That income, known as the "community spouse monthly income allowance," is not counted in determining Robert's income eligibility for Medicaid. Because of this attribution of Robert's income to Nova, under New York's "income first" policy Nova's monthly need is deemed to be met. Accordingly, at a fair hearing Nova would not be entitled to an increase in her resource allowance to generate additional income to meet her monthly need (App. A, 6a).

Because Nova's monthly need is deemed to be met by this transfer of income, the local agency concluded that any resources she had over the allowable amount of $80,760 were available to defray the cost of Robert's medical care (App. B, 24a). Nova had $88,520.94 in excess resources, consisting mostly of shares of Exxon Corporation stock valued at $154,880 (App. B, 18a, 24a).

Nova, as the wife of Robert, is legally responsible for his support under both federal and state law. *See* 42 U.S.C. § 1396a(a)(25) (1992 & Supp. 2000); 42 C.F.R. § 433.136 (1999); N.Y. Soc. Serv. Law § 101 (McKinney 1992). In New York, a community spouse may elect, as Nova did in this case (App. A, 5a), to refuse to contribute any of her income or resources towards the cost of her institutionalized spouse's care, meaning that Robert was eligible for Medicaid despite the couple's excess resources. *See* N.Y. Soc. Serv. L. §§ 366(3)(a), 366-c(5)(b) (McKinney 1992). The execution of such a refusal does not abrogate the spouse's support liability. Rather, it creates an implied contract between the refusing spouse and the local social services

district, and allows the social services district to take legal action against the refusing spouse to recover the cost of Medicaid provided to the institutionalized spouse. *See* N.Y. Soc. Serv. L §§ 366(3)(a), 369(2)(b)(ii) (McKinney 1992).

Here, the local agency notified Nova that she was liable for about $19,000, the amount of Medicaid benefits paid on behalf of her husband between March 1 and September 15, 1998 (App. A, 5a). It advised her that in the event she did not remit that amount, the local agency would commence a legal action to recover the amount of Medicaid paid for Robert's care from her excess resources (App. A, 5a). To date, Nova has not reimbursed the State for any Medicaid payments made on behalf of her husband, and the local agency has not filed suit to recover such payments.

C. This action

Nova, acting on her own behalf and as attorney-in-fact for Robert, filed this action in the United States District Court for the Western District of New York, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 (App. A, 6a). She claimed that defendants had violated the anti-alienation provisions of the Social Security Act and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1056(d)(1) (1999), by attributing to her the Social Security and pension benefits paid to Robert (App. A, 6a, App. B, 19a-21a). Had Robert's social security and pension income been unavailable, she maintained, she would have been entitled to retain all of her excess resources in order to raise the level of her income to her monthly need amount. Nova did not challenge the validity of New York's "income first" policy, but simply argued that its application to social

security and pension income violated the statutory anti-alienation provisions applicable to such income (App. A, 3a). The district court granted summary judgment to defendants, holding that their application of the income first policy was consistent with the anti-alienation provisions of the Social Security Act and ERISA (App. B, 23a-25a).

The Second Circuit reversed with respect to the social security claim and affirmed with respect to the ERISA claim (App. A, 15a). While acknowledging that defendants did not execute on, levy, attach, or garnish Robert's Social Security benefits (App. A, 8a), the court found that the deeming of Robert's benefits to Nova that would occur in a fair hearing as well as the local agency's threat of a lawsuit to recover excess resources from Nova constitutes "other legal process" within the meaning of section 407(a) (App. A, 10a-12a). The court relied on its prior decisions employing an "expansive definition of 'legal process,'" *Kriegbaum v. Katz*, 909 F.2d 70, 74 (2d Cir. 1990), that "embraces not only the use of formal legal machinery but also resort to express or implied threats and sanctions," *Fetterusso v. State of New York*, 898 F.2d 322, 327 (2d Cir. 1990) (App. A, 8a).

The Second Circuit found that this case was controlled by *Johnson v. Harder*, 512 F.2d 1188 (2d Cir.), *cert. denied*, 423 U.S. 876 (1975) (App. A, 8a-11a). There, the court held that certain provisions of the Social Security Act and its implementing regulations prohibited the State of Connecticut from counting Old Age, Survivors, and Disability Insurance (OASDI) benefits received by a parent as representative payee for her children as income to her family in determining the level of assistance she received under the Aid to Families with Dependent Children (AFDC) program. The *Johnson* Court, relying on OASDI regulations affording representative

payees full discretion in determining how to utilize OASDI benefits, held that the Connecticut plan conflicted with the federal regulations at issue because it coerced the representative payee to use the benefits for her own needs rather than the needs of the beneficiary.

In the present case, the court reasoned that Nova, who has Robert's power of attorney, has control over his social security check (App. A, 10a). "If she pays over Robert's Social Security benefits for his current care rather than applying them to her own needs," the court stated, "her future will be jeopardized because DSS will sue to obtain the assets she will need for her support in the future" (App. A, 10a-11a). As a result, the court found, the effect of the State's policy is to force Nova, the attorney-in-fact, "to spend the Social Security benefits on herself rather than Robert" (App. A, 11a). In the Second Circuit's view, because the State expects Nova to rely on Robert's social security benefits rather than the couple's joint resources to make up for the shortfall in her monthly need income, it "coerces" her to use the benefits for her own needs rather than his, and thus employs legal process to alienate those benefits from Robert, their proper recipient (App. A, 10a–11a).

The court went on to hold that the attribution of Robert's pension income to Nova was consistent with ERISA's anti-alienation provision, following the majority view that ERISA's anti-alienation provision does not protect funds after they have been paid to the pensioner (App. A, 13a-15a). *See Guidry v. Sheet Metal Workers National Pension Fund*, 10 F.3d 700 (10th Cir. 1993), *aff'd in pertinent part on rehearing en banc*, 39 F.3d 1078, 1083 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52

(3d Cir. 1994). *But see United States v. Smith*, 47 F.3d 681 (4th Cir. 1995) (restitution order requiring defendant to pay his monthly pension violated ERISA's anti-alienation provision).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Conflicts With Decisions Of The Fifth, Sixth And Eighth Circuits On An Important Question Of Federal Law

As the Second Circuit itself acknowledged (App. A, 12a-13a), its interpretation of "other legal process" as used in 42 U.S.C. § 407(a) conflicts with the Fifth, Sixth and Eighth Circuits' interpretation of that phrase. *See Norman v. St. Clair*, 610 F.2d 1228, 1243 (5th Cir.), *rehearing denied*, 617 F.2d 295 (5th Cir. 1980), *cert. denied sub nom. Schweiker v. Norman*, 453 U.S. 922 (1981); *Bradley v. Austin*, 841 F.2d 1288, 1294 (6th Cir. 1988); *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987). These other circuits have held that 42 U.S.C. § 407(a) does not prohibit States from attributing social security income in determining an individual's eligibility for Medicaid or other public assistance benefits. The conflict should be resolved by this Court.

In *Norman*, the Fifth Circuit held that Mississippi's practice of considering one spouse's social security benefits in calculating the other spouse's Medicaid eligibility was not an unlawful garnishment prohibited by 42 U.S.C. § 407. The statute, the court noted, "clearly contemplates a formal legal proceeding" that results in payment of benefits to someone other than the person entitled to them. 610 F.2d at 1243. Mississippi, however, did "not require that

the [social security checks] be paid to the nursing home or anyone other than the person who is entitled to the benefits. It does not engage in formal legal proceedings" when it deems the income of one spouse available for the other's support. *Id.*

As the Second Circuit acknowledged, its decision squarely conflicts with *Norman*. Because, it said, the *Norman* court "held that mere deeming was not contemplated by the anti-alienation statute," its decision "conflicts with *Johnson* and this circuit's definition of 'legal process' under Section 407" (App. A, 13a). *Norman* regards deeming as a simple consequence of "the congressional belief that 'it is proper to expect spouses to support each other.' " 610 F.2d at 1243 (citation omitted). The Second Circuit regards deeming, and the expectation that the spouse to whom the income is deemed available to meet his or her needs will use that income for those needs, as involving "legal process" (App. A, 10a-11a). The conflict is unavoidable.

A similar conflict arises between the decision below and the decisions in *Gorrie v. Bowen* and *Bradley v. Austin*. In *Gorrie*, applicants for and recipients of benefits under the AFDC program challenged a federal regulation requiring that the social security benefits of all coresident siblings be included in the computation of the AFDC family unit's income. The district court held that the federal regulation violated 42 U.S.C. § 407(a) because it coerced the coresident siblings to use their social security benefits to help support other family members. *See Gorrie v. Heckler*, 624 F. Supp. 85, 90 (D. Minn. 1985), *rev'd*, 809 F.2d 508 (8th Cir. 1987). The Eighth Circuit disagreed, drawing a distinction between "an inclusion of income" in the calculation of income available to a household and "an assignment or transfer" of

benefits from the rightful recipient to another party. 809 F.2d at 517. Nor, the court added, did such inclusion "constitute a use of legal process to garnish or attach benefits," for the "benefit checks are not actually received and then disbursed by the state agency; rather they continue to go directly to" the representative payee. *Id.*

Bradley is to the same effect. There, the Sixth Circuit relied extensively on *Gorrie* to conclude that a federal regulation requiring the inclusion of social security benefits in the computation of the AFDC family unit's income did not adduce legal process in violation of the anti-alienation provisions of the Social Security Act. 841 F.2d at 1294. Such inclusion, the *Bradley* court said, "does not assign or transfer * * * benefits away from the beneficiary to others, but simply mandates that OASDI income be considered in determining the overall need of a family." *Id.*

The Second Circuit's conflict with *Gorrie* and *Bradley* is as conscious and explicit as it is with *Norman*. These decisions, the Second Circuit observed, "held that deeming Social Security income to an AFDC unit was not 'legal process' and therefore did not violate Section 407(a)" (App. A, 12a). That conclusion, the court below added, "conflicts with our holding in *Johnson*" that, under Section 407(a), "state authorities could not deem the income of children receiving Social Security to other members of an AFDC family" (App. A, 12a). It was the *Johnson* decision that produced the Second Circuit's "definition of 'legal process' under Section 407(a)" (App. A, 13a); had the court below followed *Gorrie* and *Bradley* on this question it would have reached a different conclusion. Resolution of this conflict inescapably requires this Court's intervention.

The financial consequences of the Second Circuit's decision, for both New York and the federal government, are significant. The most common source of income for an institutionalized spouse, who is typically elderly and retired, is social security benefits. If New York cannot deem social security benefits available to meet the monthly needs of community spouses, and if the institutionalized spouse's other sources of income are insufficient to meet the community spouse's monthly needs, then to produce the requisite income such couples will be permitted to shelter substantial amounts of resources that would otherwise be considered available to help pay for the cost of nursing home care. The resulting fiscal impact is potentially enormous because a substantial amount of resources is needed to generate a small amount of monthly income.[7] The New York State Department of Health estimates that the Second Circuit's decision will cost New York's Medicaid program about $105,000 per case, or $10.5 million for every one hundred new cases to which the decision applies.[8] The resulting cost will be higher if, as expected, elder law practitioners adjust their financial planning strategies in response to the Second Circuit's decision.

If followed by other circuits or other state courts, the Second Circuit's decision will also substantially affect the administration of the Medicaid program in the many other "income first" States. According to a survey conducted by

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7. Currently in New York an institutionalized spouse on average contributes about $560 per month ($6,730 annually) in social security income to a community spouse. A $224,000 investment is required to realize $6,730 in annual income, assuming a 3% rate of return.

8. The estimate is expressed as a per case cost because it was not possible to estimate the number of new cases that will arise per year.

the New York State Department of Health, thirty-five States, in addition to New York, currently use the "income first" policy, which attributes social security income from institutionalized spouses to community spouses in making Medicaid eligibility determinations. The Second Circuit's decision casts doubt on the validity of this aspect of the "income first" States' Medicaid programs and could subject them and the federal government to substantially increased Medicaid outlays.

The Second Circuit's self-described "expansive" interpretation of "other legal process" may also reach far beyond the implementation of the Medicaid Act's spousal impoverishment provisions. The deeming of income, including social security income, between spouses or among family members has long been used in determining Medicaid eligibility for various categories of individuals in addition to those covered by the spousal impoverishment provisions, *see Schweiker v. Gray Panthers*, 453 U.S. 34, 44-45 (1981) (upholding federal regulations permitting States to deem spouse's income available to the applicant), and — as demonstrated by the decisions in *Gorrie* and *Bradley* — is used in determining eligibility for a variety of public benefits, including OASDI, Supplemental Security Income ("SSI"),[9] AFDC and others.[10] In all of these

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9. The SSI program assists the aged, blind or disabled "by setting a guaranteed minimum income level for such persons." *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (citing 42 U.S.C. § 1381). The deeming of income between spouses and among family members is an integral part of the SSI eligibility rules. *See, e.g.*, 20 C.F.R. §§ 416.1163, 416.1165 (1999).

10. The AFDC program was terminated, effective October 1, 1996, by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), (Cont'd)

programs, an individual's social security income is deemed available to either the applicant or other family members. The Second Circuit's decision, if permitted to stand, may be used to attack the deeming of social security income in these other contexts, resulting in huge financial consequences for States and the federal government.

The decision below squarely presents a conflict among the circuit courts over whether the attribution of social security income from its recipient to another member of his or her family unit violates the anti-alienation provision of the Social Security Act. Millions of dollars in public social services expenditures are at stake. This Court should grant certiorari to resolve the conflict.

II. The Second Circuit's Decision Is Contrary To Decisions Of This Court And Is Legally Erroneous

Review by this Court is also warranted because the Second Circuit's decision is legally erroneous. The Fifth, Sixth and Eighth Circuits' contrary interpretation of "other legal process" as not encompassing the attribution of social security benefits comports more fully with both the language of the anti-alienation provision and the Congressional intent underlying it.

(Cont'd)

which replaced AFDC with a program called Temporary Assistance to Needy Families ("Family Assistance"), *see* 42 U.S.C. §§ 601-687 (2000 Supp.); *Ward v. Thomas*, 207 F.3d 114, 117 (2d Cir. 2000). In determining eligibility for Family Assistance, New York uses AFDC eligibility rules, which include the deeming of income between spouses and among family members. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 352.30. The OASDI program continues to exist, *see* 42 U.S.C. § 402 (1991 & Supp. 2000).

The Second Circuit's "expansive" reading of section 407(a) is contrary to the plain language of the statute. Section 407(a) provides that social security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process." The term "other legal process" is properly construed "within the context of the statutory language which surrounds it," namely "execution, levy, attachment, and garnishment." *See Boersma v. Karnes*, 417 N.W.2d 341, 346 (Neb.) (interpreting "levy" as used in 42 U.S.C. § 407(a)), *appeal dismissed*, 488 U.S. 801 (1988). The terms "execution, levy, attachment, and garnishment" all refer to types of legal proceedings whereby a creditor seizes the property of a debtor.[11] No such seizure occurs when social security benefits are paid to their intended recipient and merely attributed from one spouse to another.

As the Second Circuit acknowledged, the State, in deeming Robert's social security benefits to be available to Nova to meet her monthly needs, is not seizing those benefits to pay for his medical care or to pay a debt (App. A, 8a).

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11. An execution is the "[j]udicial enforcement of a money judgment * * * by seizing and selling the judgment debtor's property." *Black's Law Dictionary* (7th ed.), p. 590. A levy, as used in 42 U.S.C. § 407(a), likewise refers to the legally sanctioned seizure or sale of property. *See Boersma v. Karnes*, 417 N.W.2d at 347. Similarly, "attachment" refers to the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." *Black's Law Dictionary* (7th ed.), p. 123. Finally, "garnishment" is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property held by the third party. *See Norman v. St. Clair*, 610 F.2d at 1243 (defining garnishment); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 834-845 n.10 (1988) (the "usual understanding of garnishment" is a process to enforce a judgment).

See Rose v. Rose, 481 U.S. 619, 643-644 (1987) (Scalia, J., concurring in part) (order basing amount of child support obligation in part on veteran's disability benefits is not "an attachment, garnishment, or seizure" because it neither "directs the disposition of the veteran's disability benefits or even specifically requires him to use them to satisfy his obligation"); *cf. Wissner v. Wissner*, 338 U.S. 655, 659 (1950) (order directing the diversion of future insurance proceeds as soon as they are made constitutes "seizure" of those proceeds); *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973) (State's lawsuit to recover social security benefits subjected the benefits to legal process). In fact, just the opposite of a seizure occurs here: by deeming the social security benefits to Nova, the State is allowing the Robbinses to put those benefits out of reach of the Medicaid program. It is undisputed that, absent the budgeting of a "community spouse monthly income allowance," the State is required to count Robert's social security benefits in determining his income eligibility for Medicaid. *See* 42 U.S.C. § 1396a(a)(17) (1992 & Supp. 2000) (in determining Medicaid eligibility, State must take into account income which is available to the applicant and which is not required to be disregarded). If those benefits put Robert's income above the prescribed level for Medicaid eligibility, they must be spent down to that level to defray his medical expenses. Only when a community spouse monthly income allowance is budgeted does the institutionalized spouse have the opportunity to put such income out of reach of the Medicaid program by transferring it to the community spouse.

Nor is there any "administrative coercion" of the sort detected by the Second Circuit. The "income first" policy does not divert the institutionalized spouse's income to the

community spouse or require the institutionalized spouse to transfer income to the community spouse. Despite the attribution of his social security income, the institutionalized spouse continues to receive his social security checks and is not required to transfer them to his spouse. The policy is merely a budgeting rule used for determining whether, in situations in which the community spouse's personal income is below her monthly need level, a higher resource allowance should be established to generate the additional income.

Even on the Second Circuit's own terms, Nova's situation entails no coercion. No one contends that section 407(a) bars the State from counting Robert's social security benefits in determining his Medicaid eligibility, and from looking to any income in excess of the prescribed levels to defray the cost of his care. If those benefits are not attributed to Nova and thus sheltered from the spending-down process, they will be used on Robert's medical care in lieu of Medicaid funds. It does not "coerce" Nova to meet her monthly needs with funds that will in any event be unavailable to the couple.

Even if the income first rule results in the State's bringing "legal process" to bear on Nova's disposition of Robert's benefits and induces her to spend them on herself, this result is not improper. In reaching the opposite conclusion, the Second Circuit overlooked a contrary decision of this Court. *See Rose v. Rose*, 481 U.S. 619 (1987). *Rose* establishes that, even if the attribution of Robert's social security benefits to Nova induces Nova to use those benefits to meet her maintenance needs, section 407(a) is not violated. One question in *Rose* was whether state court proceedings to hold a veteran in contempt for failure to pay child support subjected his Veteran's Administration benefits to "attachment, levy, or seizure by or under any legal or

equitable process" in violation of 38 U.S.C. § 3101. 481 U.S. at 630-633. The Court recognized in such proceedings "an exception to the application of [the statute's] prohibition." *Id.* at 634. It noted simply that those "benefits are intended to support not only the veteran, but the veteran's family as well," so that subjecting veteran's benefits to seizure for purposes of child support "would further, not undermine, the federal purpose in providing [the] benefits." *Id.*

The same analysis applies to the present case. Nova is undisputedly an intended beneficiary of Robert's social security benefits. *See* 42 U.S.C. § 402(b), (e) (1991 & 2000 Supp.) (wife's and widow's insurance benefits); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (1939 amendments to Social Security Act which provided benefits to wives, children, widows, orphans, and surviving dependent parents of covered workers were designed to "afford more adequate protection to the family as a unit") (internal quotation omitted); *Califano v. Boles*, 443 U.S. 282, 288-294 (1979) (intended beneficiaries of mother's insurance benefits are dependent spouses). Section 407(a), like the anti-alienation provision at issue in *Rose*, is intended "to protect social security beneficiaries and their dependents from the claims of creditors." *Fetterusso v. New York*, 898 F.2d at 327; *see Rose*, 481 U.S. at 637 ("[t]he plain intent of [42 U.S.C.] § 3101(a) is to protect the veteran *and* his family against the claims of *creditors*") (emphasis in original) (O'Connor and Stevens, JJ., concurring). Nova is not Robert's creditor, but his spouse, and "from the beginning of the Medicaid program, Congress authorized States to presume spousal support." *Schweiker v. Grey Panthers*, 453 U.S. at 44 (citing *Norman v. St. Clair*, 610 F.2d at 1236). Therefore, even if Nova is "coerced" to spend those benefits on herself, and

"legal process" plays a part in the coercion, use of Robert's social security benefits to meet Nova's maintenance needs furthers Congress' intent in making such benefits available to both beneficiaries and their dependents. The "income first" rule, like the state procedures at issue in *Rose*, qualifies as an exception to the anti-alienation provision that furthers "the federal purpose."

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the decision of the Second Circuit.

Respectfully submitted,

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Petitioner
Richard F. Schauseil

ELIOT SPITZER
Attorney General of the
State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Petitioner
Antonia C. Novello

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 30, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: December 2, 1999 Decided: June 30, 2000)

Docket No. 99-7663

NOVA H. ROBBINS, on her own behalf and as Attorney-in-fact for ROBERT H. ROBBINS,

Plaintiffs-Appellants,

v.

BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health, RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants-Appellees.

Before: OAKES, STRAUB, and POOLER, Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York (Siragusa, J.) dismissing plaintiff's complaint on a motion for summary judgment.

* * *

Appendix A

POOLER, Circuit Judge:

In March 1997, after suffering a stroke, plaintiff Robert H. Robbins went to live in a nursing home. Slightly less than one year later, his wife and attorney-in-fact, Nova H. Robbins, applied to the Monroe County Department of Social Services ("DSS") for Medicaid coverage for Robert. Nova's monthly income at that time was far below the amount federal and state law allows the "community spouse" of an institutionalized Medicaid recipient to retain, an amount often referred to as the minimum monthly maintenance needs allowance ("minimum income allowance"), *see* 42 U.S.C. § 1396r-5(d)(3),(g); N.Y. Soc. Serv. Law § 366-c(2)(h); however, her assets exceeded the resource floor or community spouse resource allowance ("resource allowance") by approximately $ 88,000, *see* 42 U.S.C. § 1396r-5(f)(2),(g); N.Y. Soc. Serv. Law § 366-c(2)(d). As a result, some months after accepting Robert's Medicaid application, DSS demanded that Nova contribute to the cost of Robert's care from these "excess" assets and threatened to sue her to recover the money it had spent for Robert's care if she refused. A community spouse in Nova's position can request a "fair hearing" at which a New York State Department of Health ("DOH") hearing officer may set a resource allowance above the statutory amount to enable the assets to generate enough income to raise the community spouse's income to the level of the minimum income allowance. *See* 42 U.S.C. § 1396r-5(e)(2)(C); N.Y. Soc. Serv. Law § 366-c(8)(c). Nova did not request a hearing because DOH uses an "income first" approach in determining whether to raise the resource allowance. That is, New York would have attributed a portion of Robert's Social Security and

pension to Nova rather than increasing her resource allowance.

Nova reasonably fears that DOH's "income-first" approach will leave her destitute in her old age because the painful actuarial likelihood is that Robert will die before her. Although Robert's excess income would support Nova during his lifetime, at his death, her income would drop sharply. Nova almost certainly would be better off over the long term if she could retain all her assets to generate income even at the cost of receiving less of Robert's income in the short term. However, New York's highest court has upheld DOH's determination that the taxpayers who fund the Medicaid program, rather than the community spouse, are entitled to the "bird in the hand" of readily accessible assets, *see Golf v. New York State Department of Social Services*, 91 N.Y.2d 656, 658, 674 N.Y.S.2d 600, 697 N.E.2d 555 (1998), and plaintiffs do not ask us to revisit the conclusion that New York's use of an "income first" method is generally permissible. Instead, they argue that the allocation of Robert's pension and Social Security to Nova violates the anti-alienation provisions of the Employee Retirement Income Security Act ("ERISA") and the Social Security Act. We conclude that DSS' actions and DOH's policies violate the Social Security Act but not ERISA.

BACKGROUND

I. The Legal Framework for Medicaid Budgeting Under the Spousal Impoverishment Amendments.

Medicaid is a medical assistance program authorized "to pay for necessary medical care for those eligible individuals

whose income and resources do not allow them to meet the costs of their medical needs." *Golf*, 91 N.Y.2d at 659. The federal and state governments jointly fund Medicaid, and DOH administers the Medicaid program in New York. *See id.* at 659 and n.1. In 1988, Congress enacted the Spousal Impoverishment Amendments to the Medicaid Act, "to end [the] pauperization [of the community spouse] by assuring that [he or she] has a sufficient — but not excessive — amount of income and resources" when the other spouse must go into a nursing home. H.R. Report No. 100-105 (II), 100th Cong., 2d Sess. 65 (1988), reprinted in 1988 U.S.C.C.A.N. 888. Congress set both a minimum income allowance, *see* 42 U.S.C. § 1396r-5(d)(3), and a minimum resource allowance, *see* 42 U.S.C. § 1396r-5(f)(2), to protect the community spouse. If the community spouse's income is less than allowed, the institutionalized spouse may transfer income to her to bring her up to the minimum level. *See* 42 U.S.C. § 1396r-5(d)(1)(B). In addition, either the community spouse or the institutionalized spouse can use the fair hearing process to argue that the community spouse's resource allowance is inadequate. If either spouse can establish at a fair hearing "that the . . . resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance," DOH and DSS must increase the resource allowance until it can generate the income guaranteed by the minimum income allowance. 42 U.S.C. § 1396r-5(e)(2)(C).

As discussed previously, DOH — unlike agencies in some other states — applies an "income first" policy in determining whether a community spouse is entitled to an

increase in her resource allowance. If an institutionalized spouse has enough income to bring the community spouse's income up to the minimum income allowance, DOH and DSS will not increase the resource allowance. Instead, DSS will allow the institutionalized spouse to contribute enough income to the community spouse to bring her income to the minimum level provided by statute. Whether or not the institutionalized spouse contributes his excess income to his spouse, DSS may sue her to recover the "excess" assets that she would otherwise use to generate income.

II. DSS' Treatment of Robert and Nova's Income.

When Robert became eligible for Medicaid, he received $992.80 from Social Security and $1,870.28 from his pension per month. Nova had a monthly income of $486.80 from Social Security and $395.71 in investment income, far below her minimum income allowance of $2,019. However, her savings of $169,280.94 exceeded her resource allowance, which was $80,760. Nova declined to contribute her "excess" resources to Robert's care. Although DSS accepted Robert's application, the agency followed up by sending Nova a letter demanding repayment of $19,156.58 expended on Robert's behalf and payment of future expenses. The letter, which was dated September 15, 1998, threatened that if Nova failed to pay the entire amount demanded by September 30, 1998, DSS would "commence an action in New York State Supreme Court to recover the amount of Medicaid paid on your husband's behalf." Underlying DSS' demand is its position that it can consider "the amount of [income] which the institutionalized spouse could transfer to the community spouse, in determining whether the community spouse should

be allowed to keep additional resources for the purpose of generating income." Aff'n of Daniel J. Tarantino of April 5, 1999 P 10. Because Robert has more than enough income to bring Nova's income to the allowable level, DSS will not grant her a higher resource allowance whether or not Robert — or Nova on his behalf — actually elects to spend Robert's money for Nova's needs. *See id.* P 6.

III. Procedural Background

Nova filed this lawsuit, on her own behalf and Robert's on September 23, 1998. She alleged that defendants Barbara A. DeBuono, as DOH commissioner, and Richard F. Schauseil, as DSS director, violated the anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407, and of ERISA, 29 U.S.C. § 1056(d)(1).[1] On January 22, 1999, plaintiffs moved for summary judgment. Defendants filed a cross-motion for summary judgment on April 7, 1999. In a decision and order dated May 10, 1999, the district court determined that DSS' attribution of Robert's income to Nova did not violate either statute because mere attribution — even if it occurs during a fair hearing — does not subject the Social Security benefits to "legal process" or change the ownership of pension benefits.

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1. Plaintiffs also claimed that DSS violated the Due Process Clause of the Fourteenth Amendment and notice provisions in both the federal and state statutes. However, the parties settled this claim after the district court's decision.

Appendix A

DISCUSSION

Plaintiffs' claims on appeal rest on the central contention that defendants' policy of attributing or deeming income of an institutionalized spouse to a community spouse effectively alienates that income from the institutionalized spouse. Because Robert's income consists of Social Security and a pension subject to ERISA, plaintiffs argue that defendants violated the anti-alienation provisions of these two statutes. Defendants respond principally that no alienation takes place because — despite the threat of a lawsuit that will deplete the assets of the community spouse and the potential use of a fair hearing — the institutionalized spouse can retain all of his income unless he chooses to contribute it to the support of the community spouse.

I. The Social Security Act

The Social Security Act provides:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of

> this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407. Defendants clearly did not execute on, levy, attach, or garnish Robert's Social Security benefits. However, plaintiffs contend that the deeming of Robert's benefits to Nova that would occur in a fair hearing as well as DSS' threat of a lawsuit constitutes "other legal process" within the meaning of Section 407(a). We have employed an "expansive definition of 'legal process,' " *Kriegbaum v. Katz*, 909 F.2d 70, 74 (2d Cir. 1990), which "embraces not only the use of formal legal machinery but also resort to express or implied threats and sanctions," *Fetterusso v. State of New York*, 898 F.2d 322, 327 (2d Cir. 1990).

The seminal case in this circuit on deeming or attributing Social Security benefits is *Johnson v. Harder*, 383 F. Supp. 174 (D. Conn. 1974), aff'd, 512 F.2d 1188 (2d Cir. 1975). Because plaintiffs claim that Johnson controls and defendants that it is irrelevant, we will explain in some detail the holdings of the district court and this court. Cleo Johnson sued to invalidate a Connecticut welfare regulation that provided that Social Security benefits received by a parent as a representative payee for her children could be considered as income to the parent for purposes of calculating an Aid to Families with Dependent Children ("AFDC") grant to the extent that the Social Security benefits exceeded the budgeted needs of the children. *Johnson*, 383 F. Supp. at 175-76. Even if the parent removed the Social Security recipients from the AFDC unit, their "excess" income would be allocated to the AFDC unit. See id. at 178. The district court found that Connecticut's policy failed because the Social Security

statute and regulations required a representative payee to use her child's benefits only for the benefit of the child. *See id.* at 179-82. Although the regulations also allowed the representative payee to spend a portion of the benefit on the needs of a "legally dependent spouse, a legally dependent child, or a legally dependent parent of the [Social Security beneficiary]" if all of the beneficiary's needs were satisfied, the district court found that Connecticut's policy impermissibly coerced the representative payee to exercise the discretion offered her by the regulations in favor of herself. *Id.* at 179-82 (quoting 20 C.F.R. § 404.1607 (1974)).

On appeal, this court initially delivered an oral order as follows:

> We agree with Judge Blumenfeld that the Connecticut regulations conflict with the federal scheme for providing OASDI benefits. The federal statutes and regulations, taken in conjunction with *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973), evidence a clear intention that OASDI funds be used for the beneficiary's needs, as he or his representative payee may best determine. It would subvert this scheme to permit a state to automatically treat such benefits as available for the needs of a parent or of other children . . . .
>
> Accordingly, we affirm on Judge Blumenfeld's opinion below.

Johnson v. Harder, 512 F.2d 1188, 1189 n.2. (emphasis added). To give its order precedential value, the court then

issued a brief per curiam opinion, which said that "for the reasons stated by Chief Judge Kaufman in open court, we affirm on Judge Blumenfeld's opinion below." *Id.* Chief Judge Kaufman's oral order was incorporated in the opinion as a footnote.

Defendants argue that because *Johnson* rested on then-existing Social Security regulations rather than on Section 407, it does not support plaintiffs' position. We disagree. First, though Johnson explicitly dealt with Social Security regulations not at issue here, the district court in Johnson took the view, which this Court at least implicitly endorsed, that the attribution of the children's benefits to the parent for purposes of AFDC calculation left the parent with "no real choice;" rather she was "coerced by the defendant's action" into using the benefits in a certain way. 383 F. Supp. at 180. At least one court, relying in part on *Johnson*, has labeled such a result "administrative coercion." *Manfredi v. Maher*, 435 F. Supp. 1106, 1115 (D. Conn. 1977). Nova occupies a position that is, in this important respect, analogous to the position of Cleo Johnson. As the representative payee for two children who received Social Security survivors' benefits, Johnson had the legal authority to determine how those children's benefits were spent as long as the Social Security recipients' needs were met. See *Johnson*, 383 F. Supp. at 176-78. However, if she chose to spend the Social Security benefits solely on the two children who actually received them, she and her remaining children would suffer because the state would cut the family's AFDC benefits. Similarly, Nova, who has Robert's power of attorney, has control over his check. If she pays over Robert's Social Security benefits for his current care rather

than applying them to her own needs, her future will be jeopardized because DSS will sue to obtain the assets she will need for her support in the future. Just as in *Johnson*, "the effect of the State [policy] in question is to force the [attorney-in-fact] to exercise that discretion in favor of herself." *See id.* at 180. Although the effect on Nova and Robert Robbins may not be as immediate as the effect on Cleo Johnson and her family, the policy nevertheless works the same injustice since Nova, the person who controls Robert's benefits, has been coerced to spend the Social Security benefits on herself rather than Robert. It is precisely that type of administrative coercion that we rejected in *Johnson*.

Moreover, we accepted the district court's reasoning "in conjunction with Philpott." *Johnson*, 512 F.2d at 1189 n.2. *Philpott*, in turn, relied exclusively on Section 407 to prevent New Jersey from seeking reimbursement for public assistance funds from Social Security Disability funds that had been deposited into a bank account. *See Philpott*, 409 U.S. at 415. Because we relied on *Philpot* to decide *Johnson*, we find that *Johnson* is relevant to our interpretation of Section 407 in this case.

Finally, under *Fetterusso*, the use of express or implied threats falls within the meaning of "legal process" for purposes of Section 407. See Fetterusso, 898 F.2d at 327. Because New York's income-first policy, which is implemented both during the fair hearing process and through the express threat of a lawsuit, constitutes an explicit threat to use "legal process" against a community spouse who refuses to expend her husband's Social Security benefits on her own needs, and because threats — implicit or explicit — fall within our definition of "legal process," we hold that

the income-first policy as applied to Social Security benefits violates Section 407.

The decisions on which the defendants rely — *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988); *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987); *Norman v. St. Clair*, 610 F.2d 1228 (5th Cir. 1980); and *Jackson v. Mullany*, 708 F. Supp. 483 (N.D.N.Y. 1989) do not persuade us to the contrary. In *Gorrie*, *Bradley*, and *Jackson*, courts upheld a federal statutory requirement, see 42 U.S.C. § 602(a)(38), that in determining the eligibility of a family for AFDC, the state consider he needs and income of parents or siblings in the household who receive Social Security benefits notwithstanding the fact that those siblings or parents might not wish to apply for AFDC. *See Bradley*, 841 F.2d at 1293, 1297; *Gorrie*, 809 F.2d at 512, 525; *Jackson*, 708 F. Supp. at 487-89. Each of these courts also held that deeming Social Security income to an AFDC unit was not "legal process" and therefore did not violate Section 407(a). *See Bradley*, 841 F.2d at 1294, *Gorrie*, 809 F.2d at 517; *Jackson*, 709 F. Supp. at 489. The latter conclusion conflicts with our holding in *Johnson* that — in light of *Philpot* and implicitly Section 407 — state authorities could not deem the income of children receiving Social Security to other members of an AFDC family.[2]

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2. We do not address the remainder of the analysis in *Gorrie*, *Bradley*, and *Jackson*. Between *Johnson* and these three cases, Congress amended the AFDC statute to explicitly provide for deeming of Social Security benefits to an AFDC household "notwithstanding" the representative payee provisions of the Social Security Act. We do not decide here whether this amendment would alter our conclusion that a state may not deem the income of

(Cont'd)

See Johnson, 512 F.2d at 1189 n.2. In *Norman*, the Fifth Circuit upheld the State of Mississippi's practice of deeming one spouse's Social Security benefits to the other spouse when he applied for Medicaid. The Fifth Circuit, like the Eighth and Sixth Circuits, held that mere deeming was not contemplated by the anti-alienation statute. *See id.*, 610 F.2d at 1243. Therefore, like the decisions of those circuits, *Norman* conflicts with *Johnson* and this circuit's definition of "legal process" under Section 407.

II. ERISA

ERISA's anti-alienation provision sweeps far less broadly than does the Social Security Act's cognate section. ERISA requires only that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Secretary of the Treasury, by implementing regulation, has defined "assignment" and "alienation" as

> any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan,
>
> and
>
> any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires

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(Cont'd)
a recipient of Social Security to the AFDC unit in which she lives. We simply find that deeming Social Security benefits under the circumstances presented to us is legal process.

> from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. § 1.401(a)-13(c)(1)(i),(ii) (emphasis added). Defendants — and the majority of courts of appeals that have construed this statute and/or its implementing regulation — conclude that this statutory scheme protects benefits only while they are held by the plan administrator and not after they reach the hands of the beneficiary. *See Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52 (3d Cir. 1994); *Guidry v. Sheet Metal Workers Int'l*, 10 F.3d 700 (10th Cir. 1993), *aff'd in pertinent part on rehearing en banc*, 39 F.3d 1078 (10th Cir. 1994); *but see United States v. Smith*, 47 F.3d 681 (4th Cir. 1995). We agree with the majority view. Section 1056(d)'s requirement that pension plans contain a provision against assignment or alienation of benefits does not read comfortably as a prohibition against creditors reaching pension benefits once they have left the hands of the administrator. A statute aimed at preventing forever the alienation of pension benefits logically would contain language similar to that in the Social Security Act. Even assuming Section 1056(d) to be ambiguous, the agency charged with interpreting ERISA, the Department of the Treasury,[3] clearly states that ERISA

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3. In a recent submission to the court, plaintiffs argue that the Secretary of the Treasury lacks authority to issue regulations implementing Section 1056(d). Plaintiffs' contention rests on a misapprehension of the admittedly confusing history of the division of authority to issue ERISA regulations between the Secretaries of (Cont'd)

prevents only the alienation of "a right or interest enforceable against the plan." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Because the Department of the Treasury's interpretation is reasonable, it is entitled to deference pursuant to *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), and we accept it. Neither DSS nor DOH took or plans to take any action against the plan paying Robert's pension. Therefore, they have not violated ERISA.

CONCLUSION

We find that defendants violated the anti-alienation provision of the Social Security Act to the extent they allocated Robert's Social Security benefits to Nova but did not violate ERISA by allocating his pension benefits to Nova. We therefore affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

(Cont'd)

Labor and Treasury. *See generally Guidry*, 10 F.3d at 708-09. Initially, the Treasury Secretary's authority did not include Section 1056(d). See *id.* at 709 (citing 29 U.S.C. § 1202(c)); *see also* 43 Fed. Reg. 6942, 6942-43 (Feb. 17, 1978) (announcement of adoption of 26 C.F.R. § 1.401(a)-13). However, in August 1978, President Jimmy Carter, acting pursuant to the Reorganization Act of 1977, 5 U.S.C. §§ 901-912, transferred authority to implement Section 1056(d) from the Labor Secretary to the Treasury Secretary. Reorganization Plan No. 4 of 1978, reprinted in 1978 U.S.C.C.A.N. 9814, 9815. Congress ratified President Carter's action in 1984. Pub. L. 98-532, 98 Stat. 2705. Six years later, the Supreme Court characterized Section 1.401(a)-13 as the "applicable administrative regulation[ ]" with respect to Section 1056(d), thus removing any doubt as to the Treasury Secretary's authority. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 371-72, 107 L. Ed. 2d 782, 110 S. Ct. 680 and n.1 (1990).

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED MAY 10, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

No. 98-CV-6399

NOVA H. ROBBINS, on her own behalf and as Attorney-in-fact for Robert H. Robbins,

Plaintiff,

v.

BARBARA A. DEBUONO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants

DECISION AND ORDER

* * *

Siragusa, J.: In this civil rights case, the plaintiff seeks to have the Court find that the defendants' Medicaid eligibility calculations of the plaintiff's income and assets, which attributed part of her institutionalized husband's Social Security and pension benefits to her, violate the anti-alienation clauses of the Social Security Act and the

Employee Retirement Income Security Act ("E.R.I.S.A."). Before the Court are motions by both the plaintiff and the defendants for summary judgment. For the reasons stated below, the Court grants the defendants' motion for summary judgment and dismisses the case.

Background and Issues

Both parties agree there are no material factual issues and this case is ripe for summary judgment. When the suit began, both plaintiff Nova H. Robbins and her husband, Robert, were 69 and Robert was in a nursing home following a stroke. He entered the nursing home on March 7, 1997, and has received Medicaid since March 1, 1998. Nova, who has a power of attorney from Robert, is suing on behalf of herself and Robert.

Jurisdiction in this Court arises under 28 U.S.C. § 1331 (for the Social Security claims) and 29 U.S.C. § 1056(d)(1) (for the E.R.I.S.A. claims) with supplemental jurisdiction for the state law claims pursuant to 28 U.S.C. § 1367(a). The plaintiff seeks enforcement of the statutory provisions of the Social Security Act and E.R.I.S.A. through the Civil Rights Statute, 42 U.S.C. § 1983.

Robert wanted to be eligible for Medicaid for at least a part of his nursing home care costs. Under Medicaid, Nova may have income in an amount established as the "Minimum Monthly Maintenance Needs Allowance" ("MMMNA") less than 42 U.S.C. § 1396r-5(d)(3). In New York, Nova's MMMNA was $2,019 per month. Defendants determined Robert had a net monthly income of $2,820.66 ($992.80 from

Social Security and $1,870.28 from his Eastman Kodak E.R.I.S.A. qualified pension, excluding Medicare and health insurance premiums). Plaintiff's Memorandum, at 3.

Besides income limitations, Medicaid also has asset ("resource") limitations applicable to both Robert and Nova. Nova, the community spouse, was entitled to a "Community Spouse Resource Allowance" ("CSRA") under 42 U.S.C. § 1396r-5(f)(2). In New York, for 1998, the CSRA ranged (per a formula) from $74,820 to a maximum of $80,760; Nova was eligible for the maximum.

When a community spouse's CSRA exceeds the maximum, as did Nova's here, the statute permits CSRA level to be increased above the maximum if her MMMNA is below the maximum. Since Nova's MMMNA was below the maximum, she was permitted to have her CSRA raised by that amount adequate to raise her MMMNA to its maximum (by the income generated by the CSRA assets). Nova's CSRA permitted under the statute was $80,760, but her assets exceeded this amount by $88,520.94 according to the Commissioner's calculations. Plaintiff's Memorandum, at 4. However, in this case, the Commissioner employed an "income first" policy which did not permit any increase in Nova's CSRA. Defendants' Memorandum of Law, at 8; Plaintiff's Memorandum, at 4. The "income first" policy allowed the Commissioner to attribute income from Robert to Nova to raise her income to the MMMNA. If her income, with the attribution, was still below the MMMNA, only then could she have her CSRA raised to the point that the assets generated enough income to raise her MMMNA to its maximum.

Appendix B

Nova's suit raises the following questions of law, which the Court reproduces from her papers:

1. Whether the policy of the defendant Commissioner for automatically allocating the Social Security benefits of an institutionalized spouse (Robert), without his consent, as income available to the community spouse. The spouse who remains living "in the community." It has nothing to do with community property. (Nova) in the administrative fair hearing process for increasing the CSRA to generate additional income for the community spouse, violates 42 U.S.C. § 407(a), which provides that,

   > The right of any person to any future payment under this subchapter [Social Security benefits] shall not be transferably or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process. . . .

2. Whether the policy of the defendant Commissioner for automatically allocating the Social Security benefits of an institutionalized spouse (Robert), without his consent as income available to the community spouse

(Nova) in the administrative fair hearing process for increasing the CSRA to generate additional income for the community spouse, violates 29 U.S.C. § 1056(d)(1) [E.R.I.S.A.], which provides that

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

3. Whether Monroe County Department of Social Services ("MCDSS"), under the direction of defendant Schauseil, violated 42 U.S.C. § 1396r-5(c)(1)(b), which provides that

> [T]he State shall promptly assess and document the total value [of the resources of both the institutionalized and community spouses] and shall provide a copy of such assessment and documentation to each spouse. . . . At the time of providing the copy of the assessment, the state shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section;

and § 1396r-5(e)(1), which provides that

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(1) Notice Upon —

(A) a determination of eligibility for medical assistance (Medicaid) of an institutionalized spouse,

. . .

each State shall notify both spouses (in the case described in subparagraph (A)) . . . of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

Discussion

The law on summary judgment is well settled. Summary judgment may be only be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(c). That is, the burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987) (en banc). Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing the "evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986). Once the moving party has met its initial obligation, the opposing party must produce evidentiary proof in admissible form sufficient to raise a material question of fact to defeat a motion for summary judgment, or in the alternative, demonstrate an acceptable excuse for its failure to meet this requirement. *Duplantis v. Shell Off-Shore, Inc.*, 948 F.2d 187 (5th Cir. 1991); Fed. R. Civ. P. 56(f). Once the moving party has met its burden, mere conclusions or unsubstantiated allegations or assertions on the part of the opposing party are insufficient to defeat a motion for summary judgment. *Knight v. United States Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986). The court, of course, must examine the facts in the light most favorable to the party opposing summary judgment, according to non-moving party every inference which may be drawn from the facts presented. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946 (3d Cir. 1990). However, the party opposing summary judgment "may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Hayes v. New York City, Department of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996).

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The New York Court of Appeals has upheld the Commissioner's "income first" policy as a reasonable interpretation of the statute. *Golf v. N.Y.S. Dept. of Social Services*, 91 N.Y.2d 656 (1998). The Third Circuit has also upheld a similar provision in New Jersey as a reasonable agency interpretation of the statute. *Cleary v. Waldman*, 167 F.3d 801 (3rd Cir. 1999). However, neither these two cases, nor any cited by the parties, raise the specific issues the plaintiff raises here regarding the Social Security statute's anti-alienation provision in 42 U.S.C. § 407 and E.R.I.S.A.'s anti-alienation provision in 29 U.S.C. § 1056(d)(1). So, although the plaintiff and defendant both agree that the "income first" policy is *per se* legal, the plaintiff argues that attribution of a portion of Robert's Social Security and his pension benefits violate the anti-alienation provisions of the two statutes.

The Anti-Alienation Provisions of the Social Security Act

The statute, 42 U.S.C. § 407(a), imposes a bar against the use of any legal process to reach Social Security benefits. It seems similar to a spendthrift trust, in that creditors cannot execute on that benefit for the payment of the beneficiary's debts. The plaintiff here argues that the mere attribution of a portion of Robert's own Social Security benefits to Nova through the "fair hearing" process is a "legal process" that violates § 407(a). The defendants respond that by attributing a portion of Robert's Social Security benefits (and his pension), they have "simply budgeted that income in computing Nova's income * * *" Defendant's Memorandum, at 8. "Defendants have not attempted to reach those benefits before their distribution to Robert; nor have defendants

sought to take or convert those benefits from Robert's bank account." *Id.* By using this method of attribution, the Commissioner determined that Nova had $88,520.94 in excess resources that were available to pay her liability for Robert's care, calculated by the Commissioner as $19,156.58. *Id.*, at 6.

During oral argument, both sides conceded that the suite turns on[1] whether the budgeting, i.e., the attribution, of a portion of Robert's Social Security benefits to Nova for the purpose of Medicaid calculations is, in effect, an "execution, levy, attachment, garnishment, or other legal process" forbidden by § 407(a). The plaintiff argues that since this attribution occurs during the "fair hearing"[2] process, it is a "legal process" which is not allowed under § 407(a). Plaintiff's Reply Memorandum of Law, at 4-6. The Court disagrees.

The defendants suggest that the lack of a hearing severely undermines the plaintiff's argument that the attribution occurred as part of a "legal process," as that term is used in § 407(a). While the Court agrees, it finds that the lack of

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1. There is no dispute that if attribution is permitted under § 407(a), it would necessarily be permitted under the less stringent anti-alienation provision of E.R.I.S.A.

2. This attribution would normally occur during the "fair hearing" process. Though no hearing took place in this case (the plaintiff argued that it would have been futile), the defendants concede that the law does not require exhaustion of administrative remedies before filing suit under 42 U.S.C. § 1983. Defendant's Memorandum, at 6, n.7.

a hearing is not determinative. That is, the court concludes that even if the attribution at issue here had been affirmed after a hearing, it would still not amount to a "legal process" violative of § 407(a).

Although the Medicaid calculation at issue here required attribution of a portion of Robert's Social Security income to Nova, the Court finds that, as a matter of law, it did not subject such income to levy, garnishment, transfer, assignment, attachment, or some type of equivalent legal process in violation of § 407(a). *See Jackson v. Mullany*, 708 F.Supp. 483 (N.D.N.Y. 1989) (similar issue in an Aid to Families with Dependent Children (AFDC case); *Gorrie v. Bowen*, 809 F.2d 508, 517 (8th Cir. 1987) (AFDC case where the Court found inclusion of benefits was not legal process and did not transfer those benefits); Defendants' Memorandum, at 22-23. Since the attribution does not violate the Social Security Act's anti-alienation provision, the plaintiff's claim fails.

The Anti-Alienation Provisions of E.R.I.S.A.

Although the specific anti-alienation provision in the pension plan was not before the Court, the same analysis applies to the plaintiff's arguments concerning the anti-alienation provisions of the E.R.I.S.A. pension from Kodak. *See* 29 U.S.C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated"). The attribution here did not occur as part of the "fair hearing" process and even if it had, there was not change in ownership effected by, or coerced by, the defendants. Thus, plaintiff's claim under E.R.I.S.A. must also fail.

Appendix B

Lack of Notice

The plaintiff complains that she did not receive a separate notice of the availability of a "fair hearing" to contest the MCDSS determination as to Nova's MMMNA or CSRA as required by 42 U.S.C. § 1396r-5(c)(1)(b) and N.Y. Social Services Law section 366-c(7)(c). Plaintiff's Memorandum, at 18-19. The notice sent to Robert in care of Nova "made absolutely no reference to how the CSR might be increased, so even if sending a notice to both, the notices were still in violation of law." *Id.*, at 19. The defendants answer that they sent the notice to Nova, that sending one copy to Nova and one to Robert in care of Nova would have been duplicative and in any event, Nova had actual notice of her right to a fair hearing. In addition, the defendants assert that the notice did contain information about a "fair hearing" right on page 2. *See* Marchese Jr. aff., Exhibit 3. Finally, defendants answer that the reason Nova did not ask for a fair hearing is not because of lack of notice, but because to do so would have been futile. Defendants' Memorandum, at 32; Complaint, ¶ 15.

Though the defendants candidly conceded at oral argument that the notice did not comply with the statutory requirements, the plaintiff neither seeks nor deserves any relief based on her complaint regarding the notice, or lack thereof. She obviously received actual notice and was able to make an informed decision not to pursue a "fair hearing" under her theory that such would be futile. Complaint, ¶ 15. Moreover, she has made no showing of any prejudice to her case, and as stated above, even if there had been a fair hearing and even if the hearing officer had made the very same

attribution, without a change in legal ownership of the protected benefits, this Court finds there is no violation of the anti-alienation provision of the Social Security Act, or E.R.I.S.A.

Conclusion

In view of the Court's findings and conclusions, the plaintiff's motion for summary judgment (document #7) is denied in its entirety and the defendant's motion for summary judgment (document #14) is granted and the case is dismissed.

So ordered.

Dated: Rochester, New York
May 10, 1999

ENTER:

CHARLES J. SIRAGUSA
United States District Judge

APPENDIX C — RELEVANT STATUTE

42 U.S.C.S. § 1396r-5 (2000)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses.

(1) Supersedes other provisions. In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this title (including sections 1902(a)(17) and 1902(f) [42 USCS § 1396a(a)(17) and (f)]) which is inconsistent with them.

(2) No comparable treatment required. Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1902(a) [42 USCS § 1396a(a)(10) or (17)], require such treatment for other individuals.

(3) Does not affect certain determinations. Except as this section specifically provides, this section does not apply to —

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories.

(A) Application in States operating under demonstration projects. In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1115 [42 USCS § 1315], the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title [42 USCS §§ 1396 et seq.].

(B) No application in commonwealths and territories. This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs. This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1934(a)(7) [42 USCS § 1396u-4(a)(7)]) or under a PACE program under section 1934 or 1894 [42 USCS § 1396u-4 or 1395eee].

(b) Rules for treatment of income.

(1) Separate treatment of income. During any month in which an institutionalized spouse is in the

institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income. In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

> (A) Non-trust property. Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides —
>
> > (i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;
> >
> > (ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property. In the case of a trust —

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this title [42 USCS §§ 1396 et seq.] (including sections 1902(a)(17) and 1917(d) [42 USCS §§ 1396a(a)(17) and 1396p(d)]), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust —

Appendix C

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

Appendix C

(C) Property with no instrument. In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership. The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources.

(1) Computation of spousal share at time of institutionalization.

(A) Total joint resources. There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse) —

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment. At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this title [42 USCS §§ 1396 et seq.], the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2).

(2) Attribution of resources at time of initial eligibility determination. In determining the resources of an institutionalized spouse at the time of application for benefits under this title [42 USCS

§§ 1396 et seq.], regardless of any State laws relating to community property or the division of marital property —

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

(3) Assignment of support rights. The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where —

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title [42 USCS §§ 1396 et seq.], no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined. In this section, the term "resources" does not include —

(A) resources excluded under subsection (a) or (d) of section 1613 [42 USCS § 1382b(a) or (d)], and

(B) resources that would be excluded under section 1613(a)(2)(A) [42 USCS § 1382b(a)(2)(A)] but for the limitation on total value described in such section.

(d) Protecting income for community spouse.

(1) Allowances to be offset from income of institutionalized spouse. After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution,

there shall be deducted from the spouse's monthly income the following amounts in the following order:

> (A) A personal needs allowance (described in section 1902(q)(1) [42 USCS § 1396a(q)(1)]), in an amount not less than the amount specified in section 1902(q)(2) [42 USCS § 1396a(q)(2)].
>
> (B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.
>
> (C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.
>
> (D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1902(r) [42 USCS § 1396a(r)]).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

Appendix C

(2) Community spouse monthly income allowance defined. In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which —

> (A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds (B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance.

> (A) In general. Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds —
>
> > (i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981

[42 USCS § 9902(2)]) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent. For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of —

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance. The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $ 1,500 (subject to adjustment under subsections (e) and (g)).

(4) Excess shelter allowance defined. In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of —

> (A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and
>
> (B) the standard utility allowance (used by the State under section 5(e) of the Food Stamp Act of 1977 [7 USCS § 2014(e)]) or, if the State does not use such an allowance, the spouse's actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

Appendix C

(e) Notice and fair hearing.

(1) Notice. Upon —

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(C)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing.

(A) In general. If either the institutionalized spouse or the community spouse is dissatisfied with a determination of —

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2));

such spouse is entitled to a fair hearing described in section 1902(a)(3) [42 USCS § 1396a(a)(3)] with respect to such determination if an application for benefits under this title [42 USCS §§ 1396 et seq.] has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance. If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse.

(1) In general. An institutionalized spouse may, without regard to section 1917(c)(1) [42 USCS § 1396p(c)(1)], transfer an amount equal to the

community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined. In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which —

(A) the greatest of —

(i) $ 12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or (II) $ 60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3); exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders. If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1917 [42 USCS § 1396p] shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

(g) Indexing dollar amounts. For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions. In this section:

(1) The term "institutionalized spouse" means an individual who —

(A) is in a medical institution or nursing facility or who (at the option of the State)

is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)], and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

* * * *

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No. 00-489

In The

Supreme Court of the United States

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Petitioners,

v.

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Rene H. Reixach, Jr.
Counsel of Record
WOODS, OVIATT GILMAN LLP
700 Crossroads Building
Rochester, New York 14614
(716) 987-2800

Attorneys for Respondents

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3967)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL

The decision below does not conflict with the decisions of any other circuit courts of appeal for two reasons.[1]

First, 42 U.S.C. § 407(b) requires an explicit statutory cross-reference to override the anti-alienation protections for Social Security benefits under 42 U.S.C. § 407(a). In this case, there is no question that the medical assistance ("Medicaid") statute, 42 U.S.C. § 1396r-5, makes no reference whatsoever to either Social Security benefits or their protection under section 407. The more recent cases relied on by petitioners concerned a provision of the former Aid to Families with Dependent Children ("AFDC") program which explicitly overrode related statutory protections for Social Security benefits, and that would have been meaningless if section 407 had not at least implicitly been overridden as well. The older case relied on by petitioners predated the enactment of section 407(b), and it concerned a Medicaid program operating under very different rules than New York's, so it is not in direct conflict with the decision below either.

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[1] While petitioners have cited a number of other cases and materials concerning whether an "income first" policy like that in question violates the federal spousal impoverishment statute, 42 U.S.C. § 1396r-5 (Pet. 6, nn. 3 & 4), none of those cases considered the question here of whether such a policy violates the anti-alienation statute, 42 U.S.C. § 407(a).

42 U.S.C. § 407(b) was enacted effective April 20, 1983 by § 335(a) of Pub. L. No. 98-21, 97 Stat. 130 (1983). It provides that "No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." In the cases relied on by petitioners from other circuit courts of appeal decided after the enactment of section 407(b), *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988), and *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987), the issue was whether the mandatory counting of Social Security benefits of other family members in computing eligibility under the since repealed AFDC program violated section 407(a).

There, the AFDC statute, 42 U.S.C. § 602(a)(38) [terminated by Pub. L. No. 104-193, 110 Stat. 2105 (1996)], contained an explicit override of the protections of 42 U.S.C. § 405(j), which requires a representative payee to use Social Security benefits solely for the beneficiary. That provision would have been rendered ineffective, and would have made no sense, had those Social Security benefits nonetheless still been protected by section 407. While that was perhaps an implicit cross-reference to section 407, in this case there is no cross-reference at all, either implicit or explicit.

The other case relied on by petitioners, *Norman v. St. Clair*, 610 F.2d 1228, 1243 (5th Cir. 1980), pre-dates the 1983 enactment of section 407(b), so the limitations in that statute were obviously not considered by that court. Moreover, in *Norman*, the court held that the Medicaid statute applicable to the program in Mississippi, 42 U.S.C. §

1396a(f), required that state to count income that would have been counted by the Supplemental Security Income (SSI) program, including Social Security benefits. *Id.* In New York, by contrast, the applicable Medicaid statute, 42 U.S.C. § 1396a(a)(10)(C)(i)(III), permits methodologies for determining income eligibility which are more generous than under SSI.

Congress is well aware of the limitations of section 407, and when it has chosen to override them, it has done so explicitly. *See, e.g.*, 42 U.S.C. § 659(a)(concerning spousal support); 26 U.S.C. § 6334(c)(concerning levies by the Internal Revenue Service). Had Congress wished to afford state Medicaid programs an override of section 407 similar to that it afforded for support and for the IRS, it surely knew how to do so, and this Court is not the proper forum to rewrite the Medicaid statute to suit the State.

The second reason why the decision below does not conflict with the decisions of any other circuit courts of appeal is that, unlike all the other cases relied upon by petitioners for their conflict theory, this case involves the mandatory[2] re-

[2] While petitioners assert that this re-allocation is voluntary, "Robert is permitted – but not required" to transfer his income to Nova as part of the process for increasing the CSRA at a Fair Hearing (Pet., 9), the formal policy of New York requires such re-allocation. N.Y.S. Dept. of Social Services Administrative Directive 89 ADM-47, § IV(d)(i), p. 23, states the policy (administration of Medicaid in New York having subsequently been transferred to the Department of Health): "In the event that the institutionalized spouse does not make available the community spouse monthly income allowance . . ., an additional resource allowance cannot be established." The brief of the State Health Commissioner in the Second Circuit stated: "If the couple's

allocation of Social Security benefits in an administrative Fair Hearing. This is not just some ministerial budgeting function performed by a front-line welfare department examiner as in all the other cases relied upon by petitioners, but truly is "other legal process" within the meaning of section 407. For that reason, also, the assertion at pp. 17-18 of the Petition, that the decision below could affect other benefit programs, is incorrect. This Fair Hearing procedure to increase allowable resources is unique to the small fraction of Medicaid cases involving institutionalized spouses.

A Fair Hearing is a hearing on the record, subject to a panoply of statutory and regulatory requirements. 42 U.S.C. §§ 1396a(a)(3), 1396r-5(e)(2); N.Y. Social Services Law §§ 22, 366-c(8) (McKinney 1992); 42 C.F.R. §§ 431.200 *et seq.* (1999); 18 N.Y.C.R.R. §§ 358-1.1 *et seq.* (1999). In cases involving the discontinuation or reduction of benefits, it is required as a matter of due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In New York, it is subject to the requirements for adjudicatory proceedings under the N.Y. State Administrative Procedure Act §§ 301 *et seq.* (McKinney 1995).

Fair hearings are sufficient "legal process" in that they are an alternative to court proceedings where a spouse living in the community seeks support from the spouse in an institution who is receiving Medicaid. 42 U.S.C. §§ 1396r-5(e)(2)(A)(i),

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combined income equals or exceeds the community spouse's monthly need, a higher resource allowance is not established, regardless of whether the institutionalized spouse actually transfers income to the community spouse." (p. 16).

1396r-5(e)(2)(B). Most significantly, the fact finding in an administrative fair hearing is a sufficiently formal legal process to be binding under collateral estoppel principles, even in an independent federal court action under 42 U.S.C. § 1983. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

Thus, the re-allocation of Social Security benefits in a Fair Hearing is the result of "other legal process," even if the more routine ministerial budgeting in the cases cited by the petitioners is not.

II. THE DECISION BELOW IS CONSISTENT WITH PRIOR RULINGS BY THIS COURT

The petition raises no important question of federal law and makes no showing that the decision below conflicts with relevant decisions of this Court. To the contrary, the decision below is consistent with the well-understood limitations imposed by section 407 and the two prior decisions of this Court construing it.

This Court first considered section 407 in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). There, the statute was described as being "all-inclusive." *Id.* at 415. In the face of a claim similar to that raised by petitioner here, this Court held that section 407 was a "broad bar," contained no implied exception for public benefit programs and did not permit a State Welfare agency to place itself "in a preferred position as compared with any other creditor," *Id.* at 416. Subsequently in *Bennett v. Arkansas*, 485 U.S. 395 (1988), this Court rejected a similar effort to make Social

Security benefits subject to taking by a State prison system.

Nothing in the decision below conflicts with those decisions, and petitioners have not demonstrated that this case raises any important new issues on this subject.

III. IF THE CONDITIONAL CROSS-PETITION IS NOT GRANTED, THERE IS NO LONGER ANY JUSTICIABLE CASE AND CONTROVERSY

On the facts of this case, unless the conditional cross-petition being filed herewith, *Robbins v. Novello*, No. 00-_____, is granted, there will no longer be a case and controversy justiciable in this court under Article III of the Constitution.

Nova was allowed $2,019 of monthly income and had $882.51 of income in her name, leaving a monthly shortfall of $1,136.49 (Pet., App. A, 5a). Robert's pension was $1,870.28 per month (Pet., App. A, 5a), and the courts below held that the mandatory re-allocation of his pension to Nova did not violate ERISA (Pet., App. A, 15a, 25a). The conditional cross-petition in *Robbins v. Novello*, No. 00-_____, seeks review of that issue of whether New York's mandatory re-allocation policy violates ERISA.

If the conditional cross-petition is not granted, so that the rulings below that the mandatory re-allocation of Robert's pension is lawful under ERISA become final, then there no longer will be any case and controversy on the issue

under the Social Security Act raised by petitioners. If Robert's pension income of $1,870.28 per month is added to Nova's own income of $882.51 per month, the $2,752.79 total is more than the $2,019 monthly income allowance for Nova. Thus, if the law of the case is that Robert's pension income lawfully was re-allocated to Nova, then the Medicaid program would have no need to re-allocate Robert's Social Security benefits.

How the New York Medicaid program would have treated Robert's Social Security benefits would then only be an issue if his pension had been at least $733.80 less per month. Thus, absent review of the ERISA issue on the conditional cross-petition, the Social Security issue raised by petitioners will become an abstract and purely hypothetical question between the parties.[3]

[3] The converse is not true, and if both this petition and the conditional cross-petition were granted, there would be a live case and controversy as to both issues. If Robert's Social Security benefits of $992.80 per month (Pet., App. A, 5a) were added to Nova's $882.51 of monthly income, she would still be below the $2,019 monthly income allowance, so there would still be a case and controversy about whether any of Robert's pension benefits mandatorily could be re-allocated to make up the difference.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RENÉ H. REIXACH, JR.
Counsel of Record
WOODS OVIATT GILMAN LLP
700 Crossroads Building
Rochester, New York 14614
(716) 987-2800

Attorneys for Respondents

(3)

No. 00-489

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Petitioner Richard F. Schauseil

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Petitioner Antonia C. Novello

* *Counsel of Record*

163602

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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FURTHER REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Conflicts With Decisions Of The Fifth, Sixth And Eighth Circuits On An Important Question Of Federal Law

Despite the Second Circuit's candid acknowledgment of the conflict between its decision and those of several other federal courts of appeals (App. A, 12a-13a), respondents argue unconvincingly that the Second Circuit's interpretation of "other legal process" as used in 42 U.S.C. § 407(a) does not conflict with the Fifth, Sixth and Eighth Circuits' interpretation of that phrase. *See Bradley v. Austin*, 841 F.2d 1288, 1294 (6th Cir. 1988); *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987); *Norman v. St. Clair*, 610 F.2d 1228, 1243 (5th Cir.), *rehearing denied*, 617 F.2d 295 (5th Cir. 1980), *cert. denied sub nom. Schweiker v. Norman*, 453 U.S. 922 (1981). Respondents do not dispute that the Second Circuit's holding on the Social Security claim — that the attribution of Robert's social security to Nova constitutes an alienation of Robert's social security benefits — is fundamentally at odds with the holdings of these other circuits that the mere attribution of social security benefits among family members in determining an applicant's eligibility for public assistance does not alienate those benefits. Respondents rely on 42 U.S.C. § 407(b), which states only that a provision of law may not modify the anti-alienation protections of section 407(a) unless it contains an "express" cross-reference to section 407. But section 407(b) does nothing to minimize the conflict on the antecedent issue of whether attribution of income constitutes and alienation of income.

According to respondents, because *Norman* was decided in 1980, before the explicit cross-reference requirement of section 407(b) was enacted in 1983, "the limitations in that

statute were obviously not considered by that court" (Br., p. 2). The short answer is that the requirements of section 407(b) come into play only when the challenged action alienates the social security benefits by subjecting them to garnishment, levy, attachment or other legal process. If no alienation occurs, the statute in question need not cross-reference section 407(b). In *Norman*, the court held that the attribution of the social security benefits from their recipient to other family members did not alienate those benefits. *See Norman*, 610 F.2d at 1243. Thus, section 407(b) would have had no impact on the analysis of the *Norman* court.

Likewise unconvincing is respondents' argument that *Gorrie* and *Bradley* do not conflict with the Second Circuit's decision here. According to respondents, the statute in question in *Gorrie* and *Bradley* contained "an implicit cross-reference to section 407" whereas in the present case the spousal impoverishment provisions of the Medicaid Act contain "no cross-reference at all, either implicit or explicit" (Br., p. 2). Respondents, however, ignore that inasmuch as section 407(b) mandates an *explicit* statutory cross-reference to sustain a modification of the protections of section 407(a), an implicit cross-reference would have been insufficient to sustain the challenged attribution of income. Indeed, rather than relying on an implicit cross-reference theory, the Eighth and Sixth Circuits both squarely held — in direct conflict with the decision here, and in accord with the *Norman* court's analysis — that the attribution of social security benefits in the computation of the AFDC family unit's income did not violate section 407(a) because the attribution process did not seize the benefits or transfer them away from the beneficiary to others, but merely counted the benefits in determining the overall need of a family. *See Gorrie*, 809 F.2d at 517; *Bradley*, 841 F.2d at 1294. Thus, in *Gorrie* and

Bradley, section 407(b) was inapplicable because the attribution of the social security benefits did not alienate those benefits.

II. This Case Would Be Justiciable If This Court Grants New York's Petition But Denies The Conditional Cross-Petition

Respondents' justiciability argument is incorrect. Under the peculiar circumstances of this case, the portion of the Second Circuit's ruling relating to the ERISA claim, even if unreviewed, does not preclude the Robbinses from obtaining an increase in Nova's resource allowance. Respondents' argument is predicated on the assumption that Nova's resource allowance of $80,760 is immutable. In fact, she retains the right to seek an increase of this allowance in an administrative fair hearing that itself is subject to judicial review.

As noted by the Second Circuit (App. A, 6a n.1), following the entry of the district court's decision, the parties settled respondents' due process claims, in which Nova claimed that she had been denied proper notice of the availability of an administrative fair hearing to seek an increase in her resource allowance (App. B, 26a). The parties stipulated that if

> a decision is rendered in favor of [respondents] in [the Second Circuit] or the Supreme Court of the United States that 42 U.S.C. § 407 and/or 29 U.S.C. § 1056 was violated by either [petitioner], then if [respondents] request a fair hearing to increase the Community Spouse Resource Allowance for Nova Robbins within sixty (60) days of such court decision, [petitioners] will not consider it untimely under

> N.Y. Social Services Law § 22.4(a), and such fair hearing will be determined on the merits of [respondents'] claim that the Community Spouse Resource Allowance should be increased."[1]

If the fair hearing decision is adverse to the Robbinses, they may seek judicial review of it in state court pursuant to article 78 of New York's Civil Practice Laws and Rules ("C.P.L.R.").

In such a state court proceeding, the disposition of the ERISA claim in the State's favor would not preclude the Robbinses from obtaining an increase in Nova's resource allowance. While the doctrine of *res judicata* would preclude re-litigation in state court of the ERISA claim and any other claims that could have been raised in the prior federal action, *see Parker v. Blauvelt Volunteer Fire Co., Inc.*, 712 N.E.2d 647, 649-650 (N.Y. 1999), respondents could attempt to demonstrate that the agency's denial of Nova's request for an increase in her resource allowance was arbitrary and capricious, an abuse of discretion, not supported by substantial evidence or contrary to law. *See* N.Y. C.P.L.R. 7803(3), (4) (McKinney 1994); *see, e.g., Richardson v. Commissioner of New York City Dept. of Soc. Servs.*, 665 N.E.2d 1059 (N.Y. 1996) (reviewing fair hearing determination denying public assistance benefits). Accordingly, a case or controversy would continue to exist if this Court were to grant New York's petition but deny the conditional cross-petition.

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1. A copy of this stipulation and order is attached hereto as Appendix D. Following the entry of the Second Circuit's opinion, the district court so-ordered a stipulation (Appendix E) which extended respondents' time to request a fair hearing until sixty days after either (a) the time within which to file a petition for certiorari expires, (b) the denial of any such petition or conditional cross-petition, or (c) a decision by this Court if certiorari is granted.

III. Alternatively, If This Court Denies The Petition, It Should Vacate The Part Of The Judgment Relating To The Social Security Act Claim

If disposition of the ERISA claim in the State's favor would have rendered the Social Security Act claim academic, then the Second Circuit should never have reached the Social Security Act claim, and its purported holding on that claim is nothing more than an advisory opinion, an action "disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). In that event, although the Second Circuit's ruling on the Social Security Act claim would not tangibly benefit respondents, its existence as precedent — it is expressly couched as a holding (App. A, 11a-12a) — would work detriment to New York and other States in future cases. Therefore, if this Court declines to review the question presented by petitioners and finds that the lower court's disposition of the Social Security Act claim was unnecessary in view of its disposition of the ERISA claim in the State's favor, it should modify the Second Circuit's judgment by vacating the part relating to the Social Security Act claim, and remand the matter to the Second Circuit with instructions that the Social Security Act claim be dismissed as moot. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)) (vacating judgment of the Court of Appeals with directions that the action be dismissed by the district court where plaintiff's case became moot during the pendency of the appeal).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the decision of the Second Circuit.

Respectfully submitted,

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Petitioner
Richard F. Schauseil

ELIOT SPITZER
Attorney General of the
State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Petitioner
Antonia C. Novello

* *Counsel of Record*

APPENDIX

APPENDIX D — STIPULATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, SO ORDERED AUGUST 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2d Cir. Docket No. 99-7663

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Plaintiffs-Appellants,

v.

BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants-Appellees.

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties, that:

1. In the event that a decision is rendered in favor of plaintiffs in this Court or the Supreme Court of the United States that 42 U.S.C. § 207 and/or 29 U.S.C. § 1056 was violated by either defendant, then if plaintiffs request a fair hearing to increase the Community Spouse Resource

Appendix D

Allowance for Nova Robbins within sixty (60) days of such court decision, defendants will not consider it untimely under N.Y. Social Services Law § 22.4(a), and such fair hearing will be determined on the merits of plaintiffs' claim that the Community Spouse Resource Allowance should be increased; and

2. Plaintiffs' fourth and fifth claims are withdrawn, with prejudice.

Dated: August 3, 1999 S/ _____

WOODS, OVIATT, GILMAN, STURMAN & CLARKE LLP
Rene H. Reixach, of Counsel
Attorneys for Plaintiffs-Appellants
700 Crossroads Building
Rochester, New York 14614
Tel: (716) 987-2858

Dated: August 2, 1999 S/ _____

HON. ELIOT SPITZER
Attorney General of the
State of New York
Victor Paladino, Assistant
Attorney General
Attorney for Defendant-
Barbara A. DeBuono
The Capitol
Albany, New York 12224

Appendix D

Dated: August 3, 1999 S/ _____
CHARLES S. TURNER
Monroe County Attorney
Richard A. Marchese, Jr.,
Deputy County Attorney
Attorney for Defendant-
Richard A. Schauseil
39 West Main Street
Rochester, New York 14614

SO ORDERED:

FOR THE COURT
Karen Greve Milton, Acting Clerk
By
S/ _____
Frank J. Scardilli, Staff Counsel

APPENDIX E — STIPULATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED AS OF AUGUST 3, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action
#98-CV-6399 CJS

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Plaintiffs,

v.

BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants.

STIPULATION

The parties in this action having entered into a Stipulation which was so ordered by the United States Court of Appeals for the Second Circuit, a copy of which is attached, and the Court of Appeals for the Second Circuit having issued a Decision reversing the Judgment of this Court in part and affirming it in part, and the mandate of the United States Court of Appeals for the Second Circuit having duly issued;

Appendix E

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties, that the time set forth in the aforesaid Stipulation and Order for plaintiffs to request a Fair Hearing to increase the Community Spouse Resource Allowance shall be extended so that if plaintiffs request a Fair Hearing to increase the Community Spouse Resource Allowance for Nova Robbins within sixty days of the later of a) the time within which a petition for Certiorari would be due, after any extensions therefore, to review the decision of the United States Court of Appeals for the Second Circuit in this action, or b) within sixty days of the date on which any Petition for Certiorari or Conditional Cross-Petition for Certiorari is denied by the Supreme Court of the United States in this action, or c) within sixty days of the date of any Decision by the United States Supreme Court in this action, defendants will not consider that request for a Fair Hearing to be untimely under New York Social Services Law § 22.4(a), and such Fair Hearing will be determined on the merits of plaintiffs' claim that the Community Spouse Resource Allowance should be increased.

Dated: July 26, 2000 S/ _____

WOODS OVIATT GILMAN LLP
Rene H. Reixach, Of Counsel
Attorneys for Plaintiffs
700 Crossroads Building
Rochester, New York 14614

Appendix E

Dated: July 31, 2000

S/ _____
HON. ELIOT SPITZER
Attorney General of the State
of New York
Victor Paladino,
Assistant Attorney General
Attorney for Defendant
Barbara A. DeBuono
The Capitol
Albany, New York 12224

Dated: August 3, 2000

S/ _____
CHARLES S. TURNER
Monroe County Attorney
Richard A. Marchese, Jr., Esq.
Deputy County Attorney
Attorney for Defendant
Richard A. Schauseil
39 West Main Street
Rochester, New York 14614

SO ORDERED:

Rochester, New York
August 9, 2000

S/ _____
HON. CHARLES J. SIRAGUSA, USDJ